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Constitutional Law--Searches and Seizures--Exclusionary Rule Inapplicable to Federal Civil Tax Proceeding Where Evidence Illegally Obtained in State Criminal Investigation--United States v. Janis, 428 U.S. 433 (1976)

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Constitutional Law—SEARCHES AND SEIZURES—EXCLUSIONARY RULE INAPPLICABLE TO FEDERAL CIVIL TAX PROCEEDING WHERE EVIDENCE ILLEGALLY OBTAINED IN STATE CRIMINAL INVESTIGATION—*United States v. Janis*, 428 U.S. 433 (1976).

In November 1968 Los Angeles police seized wagering records and $4,940 from Max Janis in reliance on a search warrant. One of the police officers informed the Internal Revenue Service (IRS) of the arrest and seizure and subsequently assisted an IRS agent in analyzing the seized wagering records. Using a calculation based upon these records, the IRS assessed Janis $89,026.09 in wagering excise taxes and levied on the seized $4,940 in partial satisfaction.

In a state criminal proceeding for violation of local gambling laws, the warrant was declared invalid and the seized records were held inadmissible.[1] Janis subsequently brought an action in federal district court for refund of the $4,940 and to have the deficiency assessment quashed. The IRS counterclaimed for the unpaid balance of the assessment.

Concluding that the assessment was based substantially on evidence obtained in violation of the fourth amendment, the district court held that the assessment was invalid and that Janis was entitled to a refund. The United States Court of Appeals for the Ninth Circuit affirmed.[2] The Supreme Court reversed, holding that the "exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign."[3]

I. BACKGROUND

The exclusionary rule of evidence was adopted by the Supreme Court as a means of enforcing fourth amendment guarantees against unreasonable searches and seizures.[4] Since the 1961

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1. The state court found that the affidavit supporting the warrant "did not set forth, in sufficient detail, the underlying circumstances to enable the issuing magistrate to determine independently the reliability of the information supplied by the informants." United States v. Janis, 428 U.S. 433, 437-38 (1976). This standard was articulated by the Supreme Court in Spinelli v. United States, 393 U.S. 410 (1969), *after* the search warrant in the instant case had been issued, 428 U.S. at 437.

2. Unpublished memorandum without opinion. 428 U.S. at 439.

3. *Id.* at 459-60.

4. In Weeks v. United States, 232 U.S. 383 (1914), which made the exclusionary rule binding on the federal courts, the Supreme Court said:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under

decision of *Mapp v. Ohio*,[5] evidence resulting from an unconstitutional search and seizure has been inadmissible in state, as well as federal, criminal proceedings. The effect of the exclusionary rule in civil proceedings, however, has not been clear.[6] This section will examine the applicability of the exclusionary rule to civil cases in general and to civil tax cases in particular.[7]

A. *The Supreme Court and Civil Applicability of the Exclusionary Rule*

The Supreme Court has never applied the exclusionary rule to exclude illegally seized evidence from true civil proceedings.[8] Its decisions have indicated ambivalence, however, as some have suggested the rule's potential applicability in noncriminal cases while others have indicated hostility toward the prospect of extending the rule into the civil arena.

It is well established that the exclusionary rule is applicable in quasi-criminal proceedings—proceedings that are technically civil but actually penal in nature.[9] In the 1886 case of *Boyd v.*

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limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution . . . .

Id. at 391-92.

For a comprehensive discussion of the development of the exclusionary rule, see Geller, *Enforcing The Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

5. 367 U.S. 643 (1961).

6. *E.g.*, Cleary v. Bolger, 371 U.S. 392, 403 (1963) (Goldberg, J., concurring); 43 DEN. L.J. 511 (1966); 55 VA. L. REV. 1484 (1969); 19 WAYNE L. REV. 1583 (1973). While some courts and commentators have perceived the Supreme Court as moving toward application of the exclusionary rule in civil cases, the Court has never explicitly decided the question. Suarez v. Commissioner, 58 T.C. 792, 802 (1972); note 21 and accompanying text *infra*.

7. For a collection of civil cases in which the exclusionary rule is at issue, see Annot., 5 A.L.R.3d 670 (1966).

8. United States v. Janis, 428 U.S. 433, 447 (1976).

9. This term has been defined as follows:

> Laws that provide for punishment but are civil rather than criminal in form have sometimes been labeled "quasi-criminal" by the Supreme Court. These laws, broadly speaking, provide for civil money penalties, forfeitures of property, and the punitive imposition of various disabilities, such as the loss of professional license or public employment.

Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 381 (1976)(footnotes omitted).

United States,[10] the Supreme Court held unconstitutional a federal revenue statute requiring the defendant in a forfeiture proceeding to produce documents requested by the government or to have a refusal to do so taken as evidence of guilt. The Court found that forfeiture proceedings, "though they may be civil in form, are in their nature criminal."[11] Given the quasi-criminal nature of the action, the Court held the compulsory production of private papers equivalent to an unreasonable search and seizure and held the statute unconstitutional under the fourth and fifth amendments. In the more recent case of *One 1958 Plymouth Sedan v. Pennsylvania*,[12] state officials brought a forfeiture action against an automobile seized after an illegal search had revealed liquor not bearing appropriate tax seals. Recalling the *Boyd* precedent, the Supreme Court reasoned that since forfeiture represented a penalty for the criminal offense, it would be anomalous to exclude evidence from a criminal proceeding but not from a forfeiture proceeding that required a determination that the law had been violated.[13]

Several Supreme Court opinions in criminal cases suggest that the exclusionary rule is not limited to the criminal or quasi-criminal areas. For example, in *Silverthorne Lumber Co. v. United States*,[14] a case extending fourth amendment protections to corporations accused of criminal activity, the Court said: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."[15] In *Weeks v. United States*,[16] the Court stated that fourth amendment protection "reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."[17]

The tandem decisions of *Camara v. Municipal Court*[18] and *See v. City of Seattle*[19] carried fourth amendment protections into

10. 116 U.S. 616 (1886).
11. *Id.* at 634.
12. 380 U.S. 693 (1965).
13. *Id.* at 701.
14. 251 U.S. 385 (1920).
15. *Id.* at 392.
16. 232 U.S. 383 (1914).
17. *Id.* at 392.
18. 387 U.S. 523 (1967).
19. 387 U.S. 541 (1967).

the area of administrative searches and seizures. The petitioners in both cases had been convicted of state criminal charges for refusing to permit warrantless administrative inspections. The Supreme Court reasoned in *Camara* that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior."[20] Some commentators saw this development as presaging the extension of the exclusionary rule to civil proceedings.[21]

Although the above cases suggest an expansion of the exclusionary rule into civil actions, other recent decisions of the Court, by focusing on the theoretical justifications for the rule, have limited its scope.[22] Three dominant justifications for the rule have been recognized by the courts. The first, judicial integrity,[23] is concerned with protecting the integrity of the judicial process by declining to admit evidence tainted by illegal searches and seizures. The second justification stresses the individual rights violated in an illegal search and seizure.[24] It provides that any justification for admitting the evidence is less weighty than the public policy condemning the violation of fourth amendment rights. The third major justification for the rule is that it deters unlawful police conduct[25]—knowledge that the fruits of illegal searches and seizures will be inadmissible at trial tends to deter law enforcement officers from violating fourth amendment rights.

The Supreme Court has increasingly emphasized the deterrence rationale in its opinions limiting the scope of the rule. In *United States v. Calandra*,[26] for example, the Court declined to extend the exclusionary rule to grand jury proceedings. Defining

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20. 387 U.S. at 530 (footnote omitted).

21. *E.g.*, Clark, *supra* note 9, at 416; Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1345 (1967).

22. *See* United States v. Peltier, 422 U.S. 531 (1975) (rule of *Almeida-Sanchez* not applied retrospectively); Michigan v. Tucker, 417 U.S. 433, 446-47 (1974) (language suggesting exclusionary rule should not be applied when unconstitutional conduct is in good faith); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule not applicable to grand jury proceedings); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting) (excoriates the exclusionary rule); Desist v. United States, 394 U.S. 244, 246, 253 (1969) (*Katz* not applied retrospectively; language suggests exclusionary rule inapplicable where deterrent purpose is not served); Linkletter v. Walker, 381 U.S. 618, 636-39 (1965) (*Mapp* not applied retrospectively).

23. *See* Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 AM. CRIM. L. REV. 507, 510-11 (1975).

24. *Id.* at 508-10.

25. *Id.* at 511-17.

26. 414 U.S. 338 (1974).

the purpose of the rule in terms of deterring unconstitutional police conduct, the Court reasoned that any "incremental deterrent effect" that might accrue by extending the rule would not outweigh the costs of its imposition.[27]

One factor that the Court has considered important in weighing the deterrent effect of the exclusionary rule is the presence or absence of good faith in the law enforcement officers conducting the illegal search and seizure. The presence of good faith in a particular situation reduces the deterrent effect of the rule.[28]

The recent tendency of the Court to limit the scope of the exclusionary rule by focusing on the deterrence rationale calls into question the forecasts of its extension made subsequent to *Camara* and *See*.[29] In view of the Supreme Court's apparent ambivalence, it is not surprising that lower courts directly confronting the issue have reached mixed results. For analytical purposes, these lower court cases may be conveniently classified according to the party conducting the illegal search and seizure and the party seeking to use illegally seized evidence in the subsequent civil action.

B. Lower Courts and Civil Applicability of the Exclusionary Rule

1. Seizures by private individuals

a. Private actions. The few cases dealing with the exclusionary rule in the context of private actions involving nongovernmental searches and seizures are divided.[30] A number of courts

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27. *See id.* at 351. The dissent in *Calandra* argued that focusing on the deterrence rationale was not only erroneous, but it positioned the Court to "abandon altogether the exclusionary rule in search-and-seizure cases." *Id.* at 365.

28. *See* United States v. Peltier, 422 U.S. 531, 542 (1975).

29. Note 21 and accompanying text *supra*.

30. Leading cases excluding evidence obtained in nongovernmental seizures include: Del Presto v. Del Presto, 92 N.J. Super. 305, 223 A.2d 217 (Ch. 1966), *rev'd on other grounds*, 97 N.J. Super. 446, 235 A.2d 240 (App. Div. 1967) (evidence illegally seized by spouse inadmissible in divorce action); Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 622 (C.P. 1966) (letters illegally obtained by husband from divorced wife's car inadmissible in second divorce proceeding).

Cases admitting evidence obtained in nongovernmental seizures include: Young v. Young, 213 Pa. Super. 515, 247 A.2d 659 (1968) (testimony related to illegal entry by husband and private investigator admissible in divorce action); Sackler v. Sackler, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964) (proof of wife's adultery admissible in divorce action even though obtained by husband in illegal forcible entry into her home); Walker v. Penner, 190 Or. 542, 227 P.2d 316 (1951) (uncorked whisky bottle illegally removed from defendant's car by plaintiff's passenger admissible in personal injury action).

have found the exclusionary rule applicable to private actions involving nongovernmental seizures. In *Del Presto v. Del Presto,*[31] for instance, a state court announced that the rule of *Mapp v. Ohio*[32] was applicable in civil as well as in criminal cases. In *Williams v. Williams,*[33] the court reasoned that while constitutional protections against unreasonable searches and seizures were meant primarily to protect the citizen from governmental intrusions, the same protections should be extended to cases involving private searches and seizures because no individual should be granted "greater power than the government itself."[34]

Courts declining to apply the exclusionary rule in private actions have generally taken the position that fourth amendment protections are unavailable when governmental intrusions are not involved. In sharp contrast to the *Del Presto* approach, for example, the court in *Sackler v. Sackler*[35] failed to exclude evidence illegally seized by the husband in a divorce action because it found the *Mapp* rule applicable only to government seizures. Similarly, in *Walker v. Penner,*[36] the court asserted that the "constitutional restrictions against unreasonable search and seizure are intended as a limitation on the powers of government, and not a restraint on the unauthorized act of an individual."[37]

b. Actions in which the government is a party. The cases involving actions in which the government is a party but where an illegal search and seizure was carried out by a private individual have focused primarily on the degree of governmental participation in the illegality. In *Knoll Associates v. FTC,*[38] the exclusionary rule was applied where an illegal seizure was carried out by a private individual. In refusing to admit privately seized documents in the governmental proceeding, the Seventh Circuit noted that the private individual had stolen the documents for the purpose of assisting the FTC in a pending action and that the government had accepted the documents with knowledge of the illegal seizure.[39]

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31. 92 N.J. Super. 305, 223 A.2d 217 (Ch. 1966), *rev'd on other grounds,* 97 N.J. Super. 446, 235 A.2d 240 (App. Div. 1967).

32. 367 U.S. 643 (1961).

33. 8 Ohio Misc. 156, 221 N.E.2d 622 (C.P. 1966).

34. *Id.* at 162, 221 N.E.2d at 626.

35. 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

36. 190 Or. 542, 227 P.2d 316 (1951).

37. *Id.* at 548, 227 P.2d at 319.

38. 397 F.2d 530 (7th Cir. 1968).

39. *Id.* at 533.

A different result was reached in *NLRB v. South Bay Daily Breeze.*[40] In a proceeding to enforce an order of the National Labor Relations Board, the Ninth Circuit allowed into evidence a document illegally taken by a private individual. In declining to apply the exclusionary rule, the court noted that, unlike the situation in *Knoll,* there was no showing that the purpose of the private seizure had been to aid the government in its action.[41] The court further observed that fourth amendment protections were generally inapplicable to civil proceedings and that the deterrence rationale for the exclusionary rule was not persuasive when a nongovernmental seizure was at issue.[42] The court found support for its conclusion in *Burdeau v. McDowell,*[43] a criminal case in which the Supreme Court had not applied the exclusionary rule because the illegal seizure had been conducted by private parties without governmental participation or implied approbation.

2. *Seizures by government agents*

a. Private actions. Some courts have excluded evidence in private actions involving governmental seizures, finding no distinction between civil and criminal actions in terms of the applicability of the exclusionary rule.[44] Other courts have admitted illegally seized evidence, however, recognizing a difference in the applicability of fourth amendment protections to civil and criminal actions.[45]

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40. 415 F.2d 360 (9th Cir. 1969), *cert. denied,* 397 U.S. 915 (1970).

41. *Id.* at 363.

42. *Id.* at 363-64.

43. 256 U.S. 465 (1921). Some cases finding the exclusionary rule applicable to civil actions involving nongovernmental searches and seizures have suggested that *Burdeau* was effectively overruled by the Supreme Court in Elkins v. United States, 364 U.S. 206 (1960). *E.g.,* Del Presto v. Del Presto, 92 N.J. Super. 305, 307, 223 A.2d 217, 218 (Ch. 1966), *rev'd on other grounds,* 97 N.J. Super. 446, 235 A.2d 240 (App. Div. 1967). The Supreme Court in the instant case, however, indicated that *Burdeau* has retained its validity. 428 U.S. at 455 n.31.

44. Cases in which the evidence has been excluded include: Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958) (error to admit evidence indicating intoxication based on police-directed blood test of unconscious defendant in wrongful death action); Gilbert v. Leach, 62 Mich. App. 722, 233 N.W.2d 840 (1975) (exclusion of blood alcohol test performed at police request on defendant in negligence action where there was question as to defendant's consent); Irizarry v. City of New York, 79 Misc. 2d 346, 357 N.Y.S.2d 756 (Civ. Ct. 1974) (evidence illegally obtained by police inadmissible in malicious prosecution suit brought by private citizen).

45. Cases in which evidence has been admitted include: Honeycutt v. Aetna Ins. Co., 510 F.2d 340 (7th Cir.), *cert. denied,* 421 U.S. 1011 (1975) (evidence obtained in unauthorized search of plaintiff's home by state and local officials admissible in action to recover on fire insurance policy); Herndon v. City of Ithaca, 43 App. Div. 2d 634, 349 N.Y.S.2d

b. Governmental actions. The body of case law becomes larger and somewhat more consistent on the role of the exclusionary rule in government civil actions involving seizures by government agents. In most cases the rule has been found to apply.[46] Most of the cases in this class fit the quasi-criminal description. Tax cases, particularly relevant to the instant case, will also be treated in this section.

Quasi-criminal cases. Although forfeiture proceedings are the most numerous of the quasi-criminal class,[47] the quasi-criminal rationale has been employed to exclude illegally seized evidence in a variety of governmental proceedings.[48] While the majority of the cases that could be classified as quasi-criminal invoke the exclusionary rule to suppress evidence illegally seized by government agents, there are some exceptions. Before *Plymouth Sedan*, for example, it was not unusual for courts to decline to apply the exclusionary rule in forfeiture cases.[49] Recent decisions have also refused to apply the rule in arguably quasi-criminal circumstances. In *United States v. Fitzpatrick*,[50] for instance, the Second Circuit refused to apply the rule to exclude illegally seized evidence from a parole revocation proceeding. The court's rationale emphasized that suppression would hamper the parole system by requiring collateral suppression hearings without serving the deterrent purpose of the rule.[51] Similar reasoning was applied in *United States v. Schipani*,[52] where the court declined to apply the exclusionary rule in a sentencing proceeding.[53]

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227 (Sup. Ct. 1973), *appeal dismissed*, 35 N.Y.2d 956, 324 N.E.2d 555, 365 N.Y.S.2d 176 (1974) (evidence illegally obtained by police admissible in personal injury action).

46. A selection of such cases is included in Annot., 5 A.L.R.3d 670 (1966).

47. See notes 9-13 and accompanying text *supra*.

48. *E.g.*, *Ex parte* Jackson, 263 F. 110 (D.C. Mont.), *appeal dismissed sub nom.* Andrews v. Jackson, 267 F. 1022 (9th Cir. 1920) (deportation proceeding); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968), *aff'd sub nom.* Standard Oil Co. v. Iowa, 408 F.2d 1171 (8th Cir. 1969) (antitrust proceeding); People v. Moore, 69 Cal.2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968) (civil narcotic commitment proceeding); Carson v. State, 221 Ga. 299, 144 S.E.2d 384 (1965) (proceeding to abate gambling nuisance); La Penta v. New York State Liquor Auth., 30 App. Div. 2d 1033, 294 N.Y.S.2d 947 (Sup. Ct. 1968), *aff'd*, 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584 (1969) (liquor license revocation action).

49. *E.g.*, Martin v. United States, 277 F.2d 785 (5th Cir. 1960).

50. 426 F.2d 1161 (2d Cir. 1970).

51. *Id.* at 1164. The court noted that the exclusionary rule was available in the criminal proceeding and that the deterrent purpose of the rule was adequately served by suppression there.

52. 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

53. *Id.* at 38: "We believe that applying the exclusionary rule for a second time at sentencing after having already applied it once at the trial itself would not add in any significant way to the deterrent effect of the rule."

Instead of concerning itself with the nature of the proceeding, the court in each case considered the practical effect of imposing the exclusionary rule, finding that the cost outweighed the benefit.

Civil tax cases. Lower court decisions have almost uniformly applied the exclusionary rule to civil tax proceedings.[54] The cases typically involve a fourth amendment challenge to a wagering tax assessment on the ground that it is based on illegally seized evidence. The challenge may be raised by way of an action for injunction or refund[55] or simply as part of a defense.[56] Some courts assert that fourth amendment protections are as applicable in principle to civil cases in which the government has illegally seized evidence as they are in criminal cases.[57] Another approach is to view the tax action as essentially quasi-criminal. In *United States v. Blank*,[58] for instance, the court reasoned that large civil assessments and penalties are tantamount to criminal sanctions

54. Pizzarello v. United States, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969) (exclusionary rule applied in action to enjoin levy of jeopardy assessment); Anderson v. Richardson, 354 F. Supp. 363 (S.D. Fla. 1973) (fruits of unlawful search and seizure cannot support assessment); Yannicelli v. Nash, 354 F. Supp. 143 (D.N.J. 1973) (dictum to the effect that assessment is invalid when substantially based on illegally seized evidence; but government may place lien on illegally seized property retained in custody); United States v. Stonehill, 274 F. Supp. 420 (S.D. Cal. 1967), *aff'd*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969) (dictum to the effect that evidence illegally seized by government officials would be excluded from civil action); United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966) (exclusion of evidence seized by IRS from deficiency assessment proceeding); United States v. Chase, 67-1 U.S. Tax Cas. ¶ 15,733 (D.D.C. 1966) (assessment based on illegally seized material inadmissible in suit brought by government); Hinchcliff v. Clarke, 230 F. Supp. 91 (N.D. Ohio 1963), *rev'd on other grounds*, 371 F.2d 697 (6th Cir.), *cert. denied*, 387 U.S. 941 (1967) (suppression for criminal or civil proceedings ordered for evidence illegally seized by government); Lord v. Kelley, 223 F. Supp. 684 (D. Mass. 1963), *appeal dismissed*, 334 F.2d 742 (1st Cir. 1964), *cert. denied*, 379 U.S. 961 (1965), *aff'd sub nom.* McGarry's Inc. v. Rose, 344 F.2d 416 (1st Cir. 1965) (government barred from using illegally seized evidence against taxpayer); Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962) (assessment held invalid when based solely on evidence illegally seized by IRS); Tovar v. Jarecki, 83 F. Supp. 47 (N.D. Ill. 1948), *rev'd on other grounds*, 173 F.2d 449 (7th Cir. 1949) (dictum to the effect that assessment would be invalid if based solely on illegally obtained evidence); Hill v. Commissioner, 59 T.C. 846 (1973) (dictum to the effect that evidence seized in violation of fourth amendment should not be admitted in assessment proceeding); Suarez v. Commissioner, 58 T.C. 792 (1972) (suppression of assessment evidence illegally seized by police). *But cf.* Compton v. United States, 334 F.2d 212 (4th Cir. 1964) (presumption of correctness given tax assessment unaffected by the fact that it was based on unconstitutionally seized evidence; illegally seized evidence may be used for impeachment purposes).

55. *E.g.*, Pizzarello v. United States, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969) (injunction); Compton v. United States, 334 F.2d 212 (4th Cir. 1964) (refund).

56. *E.g.*, United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966).

57. *E.g.*, United States v. Stonehill, 274 F. Supp. 420 (S.D. Cal. 1967), *aff'd*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

58. 261 F. Supp. 180 (N.D. Ohio 1966).

and that the government should not be able to excuse its violation of constitutional mandates by choosing a "civil forum."[59]

Recent civil tax assessment cases, factually similar to the instant case, have applied the exclusionary rule. In *Pizzarello v. United States*,[60] the taxpayer brought an action to enjoin a jeopardy assessment for unpaid wagering taxes on money illegally seized by special treasury agents. In a prior criminal action, the evidence of wagering had been suppressed. Observing that without an exclusionary rule the government would be free to conduct unreasonable searches and seizures in all civil cases without suffering unfavorable consequences, the Second Circuit found the assessment invalid.[61] In *Suarez v. Commissioner*,[62] an illegal search and seizure had been carried out by state criminal law enforcement officers. In a criminal action, the illegally seized records had been suppressed. The police had made copies of these same records available to the IRS, which brought a civil assessment action. The court found support for the application of the exclusionary rule in language used by the Supreme Court.[63] After reviewing considerations of deterring unconstitutional conduct, preserving judicial integrity, and safeguarding individual rights, the court held that "the protective rule of the fourth amendment which excludes evidence illegally obtained is applicable in a civil tax case."[64] Making explicit what was implicit in the majority opinion, a concurring opinion said that it was immaterial that federal agents had not conducted the illegal raid.[65] The majority concluded that the assessment carried no presumption of correctness and that if the government were to prevail, it would have to establish the existence of a deficiency with evidence independent of that unconstitutionally seized.[66]

These tax cases arose in the precise legal context in which the exclusionary rule issue in the instant case appeared. Whenever courts have dealt directly with the question of the exclusionary rule's applicability in the civil tax setting, they have found it applicable.

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59. *Id.* at 182.
60. 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969).
61. *Id.* at 586.
62. 58 T.C. 792 (1972).
63. *Id.* at 802.
64. *Id.* at 806.
65. *Id.* at 819.
66. *Id.* at 815.

II. Instant Case

A divided Supreme Court held in *United States v. Janis* that the exclusionary rule does not preclude the use in a civil proceeding of one sovereign of evidence illegally seized in a criminal investigation by agents of another sovereign.[67] In reaching this conclusion, the majority focused on what it termed the "prime purpose" of the exclusionary rule—deterrence of "future unlawful police conduct."[68]

Observing that there was no evidence that the rule actually deters unlawful police conduct,[69] the Court concluded that the societal costs of excluding the evidence outweighed the benefits of suppression.[70] The Court reasoned alternatively that (1) if the rule does not deter, its use in the instant situation was clearly unwarranted; and (2) if the rule does deter, its application in criminal proceedings must "be assumed to be a substantial and efficient deterrent."[71] Assuming the efficacy of this deterrent effect in criminal cases, the Court said that further application of the rule to the civil proceeding of a sovereign different from the one involved in the illegal seizure would have such an attenuated deterrent effect that the costs to society would outweigh the benefits of exclusion.[72]

The majority acknowledged that the exclusionary rule had been applied in civil proceedings in other federal courts. It distinguished those cases from the instant case, however, by pointing out that most of them involved "intrasovereign" fourth amendment violations "in which the officer committing the unconstitutional search or seizure was an agent of the sovereign that sought to use the evidence."[73] The majority admitted that the exclusionary rule had been applied in an intersovereign situation in the *Suarez* case, but disagreed with the result because the tax court

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67. 428 U.S. at 459-60.

68. *Id.* at 446.

69. After discussing the difficulties inherent in any empirical test of the rule, the Court stated:

> The final conclusion is clear. No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied. . . .
>
> We are aware of no study on the possible deterrent effect of excluding evidence in a civil proceeding.

Id. at 450 n.22.

70. *Id.* at 454.

71. *Id.* at 453-54.

72. *Id.* at 454.

73. *Id.* at 456.

in *Suarez* had failed to focus on the deterrent purpose of the exclusionary rule and because it had failed to distinguish between intersovereign and intrasovereign uses of unconstitutionally seized evidence.[74]

The majority also introduced a new formulation of the judicial integrity rationale.[75] It indicated that the inquiry into whether judicial integrity would be served by the exclusion of evidence was essentially the same as inquiring whether the exclusion of evidence in a particular case would deter police from making fourth amendment violations. The focus in both inquiries was on whether the admission of illegally seized evidence would encourage violation of fourth amendment rights. The Court held that considerations of judicial integrity therefore did not require exclusion in this case.[76]

Justice Brennan, joined by Justice Marshall in dissent, emphasized individual rights instead of societal costs. He argued that the exclusionary rule is an inherent constitutional ingredient of fourth amendment protections and criticized the majority for limiting the rule.[77]

Justice Stewart, also dissenting, contended that wagering tax provisions constituted "an adjunct to the enforcement of the criminal law" and that the majority opinion frustrated the deterrent purpose of the exclusionary rule by allowing state police to turn illegally seized evidence over to the IRS on a "silver platter."[78]

III. Analysis

Given the proposition that deterrence is the primary justification for the exclusionary rule,[79] the result reached in *United States v. Janis* is consistent with recent Supreme Court decisions limiting the rule's applicability.[80] While the opinion presents some difficulties, its essential soundness is not undermined by the dissenting contention that local and federal law enforcement officers will be free to act in concert to violate fourth amendment rights.[81] The decision is important because its rationale is hostile

74. *Id.* at 456-57.
75. *See* note 23 and accompanying text *supra*.
76. 428 U.S. at 458 n.35.
77. *Id.* at 460.
78. *Id.* at 463-64.
79. United States v. Calandra, 414 U.S. 338, 347 (1974).
80. Notes 22-28 and accompanying text *supra*.
81. 428 U.S. at 463.

to the application of the exclusionary rule to many civil litigation situations, as well as to tax assessment proceedings. It also seems to effectively eliminate the independent existence of the judicial integrity justification for the exclusionary rule. The following section will examine some of the difficulties and implications of the opinion.

A. The Difficulties

1. The quasi-criminal argument for suppression

Justice Stewart contends in dissent that "wagering [tax] provisions are intended not merely to raise revenue but also to assist" law enforcement officials in enforcing criminal penalties for "unlawful wagering activities."[82] The contention suggests that the civil tax assessment proceeding in *Janis* was essentially quasi-criminal and that therefore the exclusionary rule should apply.

There is precedent for regarding a civil tax assessment proceeding as a quasi-criminal action. In *United States v. Blank,*[83] the exclusionary rule was applied to exclude illegally seized evidence from a civil tax proceeding. The federal district court in that case reasoned that if the exclusionary rule were not applicable, the government could take the "accused down a civil avenue to impose its penalties while keeping itself free from the impinging requirements of reasonableness which the Fourth Amendment imposes."[84] *Blank* may be distinguished from the present case, however, since it clearly involved the imposition of "taxes *and* penalties."[85]

The quasi-criminal analysis of the instant case may nevertheless seem reasonable in light of the large assessment involved. But the analysis would be persuasive only if the excise tax assessment itself were to be regarded as a penalty.[86] While common sense might suggest that tax assessments on wagering operations do partake of the nature of penalties, courts have held that the wagering excise tax is not a penalty but rather a revenue raising measure.[87] The Supreme Court in *Lewis v. United States,*[88] for

82. *Id.* at 461.

83. 261 F. Supp. 180 (N.D. Ohio 1966).

84. *Id.* at 182.

85. *Id.* at 184 (emphasis added).

86. *See* note 9 *supra.*

87. *See, e.g.,* Lewis v. United States, 348 U.S. 419 (1955); United States v. Kahriger, 345 U.S. 22 (1953); United States v. D.I. Operating Co., 362 F.2d 306 (9th Cir. 1966), *cert. denied,* 385 U.S. 1024 (1967); Augusta Golf Ass'n v. United States, 338 F. Supp. 272 (S.D. Ga. 1971).

88. 348 U.S. 419 (1955).

example, said that the wagering tax provision "was a constitutional exercise of the taxing power and was not a penalty under the guise of a tax."[89]

2. Danger of bad faith searches and seizures

Justice Stewart also argued that the majority opinion will enable state police to "effectively crack down on gambling law violators by the simple expedient of violating their constitutional rights and turning the illegally seized evidence over to Internal Revenue Service agents on the proverbial 'silver platter.' "[90] Particularly in view of his contention that the civil tax action is not totally unrelated to the criminal law imperatives involved in bringing illegal wagering operators to justice,[91] the possibility of a "bad faith" raid is not unimaginable. For law enforcement officers frustrated with the intricacies of warrant requirements, the large civil assessments imposed on wagerers may provide satisfactory sanctions.

Justice Stewart's prediction is undermined, however, by the fact that the Los Angeles police relied in good faith on their search warrant—they did not knowingly use a defective warrant in order to seize evidence for the purpose of turning it over to the IRS.[92] While it is true that the Court did not expressly rely on the

89. *Id.* at 421. If the wagering excise tax had been determined to be a "penalty under the guise of a tax," it probably would have been found to constitute an unconstitutional application of the taxing power.

It should be noted that *Lewis* was overruled by Marchetti v. United States, 390 U.S. 39 (1968), to the extent that *Marchetti* found mandatory registration requirements for wagerers violative of the fifth amendment protection against self-incrimination. Language in *Marchetti,* referred to by Justice Stewart in his dissent in *Janis,* does suggest that wagering tax provisions are related to criminal law enforcement provisions. While *Marchetti* does not invalidate the *Lewis* notion that the wagering tax provision is not a penalty, it does tend to put that notion into question. The fact that the *Janis* majority did not see the case in quasi-criminal terms suggests that the *Marchetti* dicta does not have much influence at present.

90. 428 U.S. at 463.

91. *Id.* at 462-63. The argument that civil tax actions against wagerers are part of a broad criminal enforcement procedure seems to be substantiated by the facts of the instant case demonstrating close cooperation between the law enforcement and tax authorities. *Id.* at 436-37.

92. *Id.* at 458 n.35. The majority never doubted that the purpose of the seizure was to procure evidence for a state criminal proceeding. The close cooperation between the law enforcement and tax authorities in the instant case, however, raises the possibility that a subsidiary purpose may have been to provide the tax authorities with evidence upon which to base an assessment. Given the possibility of such dual purpose seizures, judicial testing for good faith may be a troublesome area in future cases similar to *Janis.* For a discussion of some of the difficulties involved in testing for good faith, see Comment, *Fourth Amend-*

officers' good faith in sustaining the use of the evidence, the Court's holding is factually distinguishable from a case in which bad faith is present.

3. *The balancing formula*[93]

The Court rejected the use of the exclusionary rule because it found the "likelihood of deterring the conduct of the state police" insufficient to outweigh the "societal costs imposed by the exclusion."[94] Yet the Court was not explicit about the nature of those costs. It referred generally to the costs of proscribing relevant evidence and of hampering law enforcement,[95] but it did not specifically address whether the cost element of the balancing test applied in criminal cases[96] is equally serviceable in a civil case.

The ultimate costs to society are obviously not the same in civil and criminal proceedings. In criminal cases, the cost of the exclusionary rule is that "[t]he criminal is to go free because the constable has blundered."[97] The cost to society in applying the exclusionary rule in a civil tax assessment proceeding is largely monetary[98]—the tax assessment may be invalidated. This cost does not seem to be particularly high in view of the infrequent applications of the exclusionary rule in tax proceedings and the alternative means of tax assessment available to the IRS.[99] If society values the conviction of criminals more highly than it does the collection of taxes, the cost to society of applying the exclusionary rule in the instant case could be trivial in comparison to

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ment in the Balance—The Exclusionary Rule After Stone v. Powell, 28 BAYLOR L. REV. 611 (1976).

93. For a discussion of the balancing formula, its origins, and its application to *Janis*, see Comment, *Fourth Amendment in the Balance—The Exclusionary Rule After Stone v. Powell*, 28 BAYLOR L. REV. 611 (1976).

94. 428 U.S. at 454.

95. *Id.* at 447.

96. *See* United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338 (1974); Linkletter v. Walker, 381 U.S. 618 (1965).

97. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

98. There may also be a "regulatory cost" involved in the frustration of the wagering provision—to the extent that the tax is seen to have a regulatory effect on wagerers. Although the extent of this cost is uncertain, it seems clear that the cost to society is still less than that involved in having a "criminal go free." Of course, if the tax assessment is perceived to constitute a quasi-criminal sanction, the potential cost to society is arguably closer to that involved in the criminal context. As long as the wagering tax is seen as a revenue raising measure, however, the quasi-criminal approach will not be valid.

99. *See* Suarez v. Commissioner, 58 T.C. 792, 819-20 (1972); Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1, 31 (1966).

the cost in a criminal case. The Court's effort to demonstrate the miniscule deterrent effect application of the exclusionary rule would have in the present case suggests that the Court is merely balancing trivialities against each other.

Nevertheless, the outcome of the Court's weighing is reasonable. Even if it be admitted that the benefits and costs weighed by the Court are trivial by comparison to those at stake in criminal cases, the costs of applying the exclusionary rule may well exceed the benefits of the inconsequential deterrent effect the rule would have in the instant case. Thus, the balancing of apparent trivialities in the instant case does not cast doubt upon the Court's method of analysis as much as it reveals the lack of compelling reasons to apply the exclusionary rule in this factual context.

B. The Implications of Janis *for Civil Proceedings*

The Court's statement of the holding does not explicitly prohibit the exclusionary rule's application to civil proceedings generally.[100] Yet the thrust of the opinion substantially limits the applicability of the exclusionary rule in a variety of civil contexts.

1. Seizures by private individuals

Making specific reference to *Burdeau v. McDowell*,[101] the Court observed that the exclusionary rule is not applicable when a private party conducts the illegal seizure.[102] Although *Burdeau* has been termed "an anachronism,"[103] and has been viewed as effectively overruled by subsequent Supreme Court decisions,[104] the Court here gives notice that the case has vitality. This vitality is probably enough to discredit lower court decisions that have applied the exclusionary rule in proceedings involving private seizures.[105]

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100. *See* 428 U.S. at 459-60.

101. 256 U.S. 465 (1921).

102. 428 U.S. at 455 n.31. The Court also referred to United States v. Stonehill, 274 F. Supp. 420 (S.D. Cal. 1967), *aff'd*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969), to note the inapplicability of the exclusionary rule when a foreign government commits the illegal search and seizure.

103. Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1359 (1967).

104. Note 43 *supra*.

105. This would be true provided the private seizure is conducted without government participation or approbation. *See* notes 38-43 and accompanying text *supra*.

2. Seizures by government agents

a. Private actions. If deterrence is the perceived justification for applying the exclusionary rule, decisions applying the rule in private actions involving governmental searches and seizures are of dubious merit—the threatened unavailability of the illegally seized evidence to private litigants would seem to have no deterrent effect on police, whose primary interest is government criminal prosecutions.[106] The particular analysis of deterrence in *Janis* makes this conclusion more compelling. If the deterrent effect is too attenuated to justify the rule's application in a government action when agents of another sovereign have conducted the illegal search and seizure, then the inapplicability of the rule in a private civil action follows a fortiori.

b. Actions in which the government is a party. An issue explicitly left open by the Court is whether the exclusionary rule is applicable in cases where the law enforcement officers are of the same sovereign that seeks to use the illegally obtained evidence in a civil proceeding.[107] The unanswered question is itself a function of the Court's novel effort to distinguish *Janis* from the tax cases in which the rule has been applied. The Court's reasoning that there is a difference in deterrent effect between situations involving "intrasovereign" and "intersovereign" fourth amendment violations permits it to reject the result reached in *Suarez*,[108] where the exclusionary rule was applied in a federal proceeding to suppress evidence seized by local law enforcement officers. It does not impair decisions like *Pizzarello*,[109] however, which involve applications of the exclusionary rule in tax proceedings where federal agents conducted the unconstitutional seizures. Thus the decision is rather limited in one sense—it does not challenge most of the precedents in the civil tax assessment area. Given the Court's apparent inclination to limit the scope of the exclusionary rule,[110] however, it is not inconceivable that a future civil case involving an intrasovereign violation could be decided in much the same way as this case.

c. Quasi-criminal cases. Even though *Janis* is a civil case, the opinion's reasoning raises the possibility that the exclusionary

106. 428 U.S. at 458.
107. *Id.* at 455 n.31.
108. 58 T.C. 792 (1972). *See* notes 62-66 and accompanying text *supra.*
109. 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969). *See* notes 60-61 and accompanying text *supra.*
110. *See* notes 22-28 and accompanying text *supra.*

rule may not be applicable to all quasi-criminal situations. The Court implicitly recognized the general legitimacy of the exclusionary rule's application in quasi-criminal cases by referring to the continued validity of *One 1958 Plymouth Sedan v. Pennsylvania*.[111] But *Plymouth Sedan* involved an intrasovereign fourth amendment violation.[112] Thus, the rationale of *Janis*, which finds a difference between intrasovereign and intersovereign fourth amendment violations, suggests the possibility that the exclusionary rule might not be applied if a quasi-criminal action were brought by a sovereign different from the one whose agents conducted the illegal seizure.

While the above approach is plagued by substantial difficulties,[113] an application of the *Janis* rationale to quasi-criminal cases is conceivable in light of the Supreme Court's rejection in *Calandra* of a mechanical application of the exclusionary rule in favor of application when its deterrence objectives are best served.[114] Deterrence effect could be just as attenuated in an intersovereign quasi-criminal context as in an intersovereign civil setting. Thus an intersovereign fourth amendment violation in a quasi-criminal case could provide the Court with an opportunity to impose additional limitations on the scope of the exclusionary rule.[115]

C. *Deterrence and the Debilitation of the Judicial Integrity Rationale*

On several occasions the Supreme Court has asserted that the primary purpose of the exclusionary rule is to deter unconstitutional conduct by law enforcement officers.[116] The Court made

111. 428 U.S. at 447 n.17.

112. Pennsylvania agents made the initial seizure; the state brought the subsequent forfeiture action. 380 U.S. 693, 694 (1965).

113. The Court would have to overturn or distinguish the quasi-criminal precedents that have applied the rule. It would also have to contend with the reality that fourth amendment protections are conceptually well established in the quasi-criminal sphere where significant penalties against property and liberty may be assessed.

114. 414 U.S. 338, 348 (1974).

115. The Court's distinction between intrasovereign and intersovereign fourth amendment violations conceivably could be applied in purely criminal cases as well. While such application might follow logically from the Court's approach in *Janis*, in view of the vitality of the exclusionary rule in the criminal context, it seems doubtful that the Court would choose to so limit the rule's applicability.

116. *See* United States v. Peltier, 422 U.S. 531, 542 (1975); Michigan v. Tucker, 417 U.S. 433, 446-47 (1974); United States v. Calandra, 414 U.S. 338, 347-48 (1974); Desist v. United States, 394 U.S. 244, 254 n.24 (1969).

the same assertion in this case.[117] But the Court went beyond this by defining judicial integrity in terms of deterrence:

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.[118]

This redefinition of judicial integrity in terms of deterrence may simply make explicit how the Court has been interpreting the judicial integrity justification for some time.[119] The explicit redefinition in *Janis* was clearly foreshadowed in *United States v. Peltier*:[120] "This approach to the 'imperative of judicial integrity' does not differ markedly from the analysis the Court has utilized in determining whether the deterrence rationale undergirding the exclusionary rule would be furthered by retroactive application of new constitutional doctrines."[121] The definition of judicial integrity appearing in *Janis*, then, does not represent a divergence from recent opinions; rather it articulates more clearly how the Court had already been perceiving the judicial integrity rationale.

The emaciation of the independent validity of the judicial

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117. 428 U.S. at 446.

118. *Id.* at 458 n.35.

119. It has been observed that judicial integrity as a justification for the exclusionary rule has been relegated to a minor role with dubious impact on the outcome of cases. Oaks, *supra* note 4, at 669. In 1973, a commentator suggested that one reason for the relative impotency of the judicial integrity rationale was that the Supreme Court had implicitly redefined it in terms of deterrence. The theory behind the redefinition was set forth as follows:

> This implicit redefinition may well have proceeded on the theory that harmony with the deterrence rationale could be achieved by defending the judicial integrity rationale in terms of its ultimate goals, rather than in terms of the responsibility which it places upon the Court to comprehensively protect a defendant's fourth amendment rights. Harmony is in fact possible under such a scheme, because the focus of a goal-oriented definition of the judicial integrity rationale, like that of the deterrence rationale, is upon public interests.

Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129, 1153 (1973).

120. 422 U.S. 531 (1975).

121. *Id.* at 538.

integrity rationale was confirmed in *Stone v. Powell*,[122] which was decided concurrently with *Janis*. There, the Court referred to the "limited role of this justification [judicial integrity] in the determination whether to apply the [exclusionary] rule in a particular context."[123] The Court repeated that deterrence was the exclusionary rule's primary justification.[124]

IV. Conclusion

The Supreme Court's decision in *United States v. Janis* is basically sound. The quasi-criminal argument for applying the exclusionary rule is relatively weak in view of the judicial tendency to find the wagering excise tax a revenue raising measure instead of a penalty. The danger of the decision being perceived as a justification for bad faith searches and seizures seems to be obviated by the critical fact of good faith on the part of the local law enforcement agents in this case. Despite the Court's cursory treatment of the cost element of its balancing formula, its analysis reveals a lack of compelling reasons to employ the exclusionary rule in a civil action involving an intersovereign fourth amendment violation.

The significance of the decision inheres in its aversion to applying the exclusionary rule in several civil contexts: civil actions involving nongovernmental illegal searches and seizures, civil actions brought by a sovereign different from the one whose agents conducted the illegal search and seizure, and, possibly, quasi-criminal actions of an intersovereign nature. The decision is also significant for its overt redefinition of the judicial integrity justification for the exclusionary rule. More explicitly than earlier Supreme Court decisions limiting the role of the judicial integrity rationale, *Janis* suggests that deterrence is not merely the primary justification for the rule; realistically, it is the only justification.

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122. 428 U.S. 465 (1976).
123. *Id.* at 485.
124. *Id.* at 486.